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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF GREENLEAF PUBLISHING COMPANY AND HMH PUBLISHING CO., INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF.

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ment). See in particular comments of Webster, Clay and Davis, and debates, *passim*, Cong. Globe, 24th Cong., 1st Sess. 36, 150, 164, 165, 347, 348, 351, 354, 539.

It was not until 1825 that the Congress declared the postal service a monopoly and no longer permitted private competition (4 Stat. 102).

Indeed one notes that for almost a century after the adoption of our Constitution no Congress presumed upon the powers of the States to invoke the postal or interstate commerce powers in order to regulate the flood of scurrility which filled the newspapers of the nineteenth century. Scurrility of that era was as objectionable as "obscenity" in ours but Congress preferred to endure scurrility rather than to attempt to arrogate to itself a Federal power which it did not have.

In the Tariff Act of 1842 Congress for the first time applied the label "obscene" to material. Act of Aug. 30, 1842, 27th Cong., 2d Sess., 5 Stat. 566. The statute prohibited the importation of "obscene prints, paintings, lithographs, engravings and transparencies", but excluded books and other printed textual matter from the ambit of that prohibition. This even though in this same tariff act a tariff was levied on books. Thus the Congress recognized the same limitation in 1842 when examining the power over foreign commerce as it had recognized in 1836 when dealing with the postal power. In that era of the development of the Printed Arts, Congress had not yet come to realize that both Pictures and Books fall in the same sacred area of Ideas *Qua* Ideas.

(d) Power over speech and press is in the States alone.

The First Amendment imposed a limit on Federal power. The rights of the people and State powers not granted to the Federal government were explicitly reserved by the Ninth and Tenth Amendments. Such reservation was made explicit because the States were apprehensive of the abuse of power by the *national* government. As the constitutional historian Charles Warren has commented, opposition to ratification of the Constitution stemmed from

> "their profound belief that it was intended and framed to bring about a consolidation and ultimate destruction of the States and State sovereignty."
>
> (The Making of The Constitution, 753.)

To allay these fears, specific limits on Federal power were devised by the Bill of Rights. The States alone were given the power to balance the interests of free speech and press against the demands of morality. Yet the Federal government now claims just such authority. Mr. Justice Frankfurter has recently reminded us it was Jefferson's view that the Federal government had no such power:

> "* * * [T]he gravamen of the attack in the Virginia and Kentucky Resolutions against the Alien and Sedition Acts of 1798 was that they infringed on the rights of the states and were promotive of 'a general consolidated government.' It deserves to be recalled that even Jefferson attributed to the states the power which he denied to the federal government. 'Nor does the opinion of the unconstitutionality and consequent nullity of that law—the [Sedition Act]', he wrote * * * 'remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue,

all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. * * * While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.' "

("John Marshall and the Judicial Function" 69 Harv. L. R. 217, 225-226 (1955).)

And this was the view generally held by Republicans opposing the Sedition Act. They

"* * * regarded the punishment of libels and seditious speech and writings as a province of the states rather than of the Federal government. Nathaniel Macon declared that 'the liberty of the press was sacred'—but he meant only as against the Federal government, not against the states. Indeed, as he added, 'the states have complete power on the subject.' "

(Miller, Crisis in Freedom, 168-169 (1951).)

This viewpoint, so strongly expressed by Thomas Jefferson and others of our earlier statesmen is fortified by examination of the record of the First Congress.

(1) *An Amendment to forbid State regulation of speech and press was rejected.*

When Madison presented the draft of the Bill of Rights to the First Congress he proposed two separate provisions to deny authority over the rights of speech and press—one running against the general government, one against the States. The House adopted limits on both Federal and State power, the State provision reading:

"The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any state."

(1 Annals of Congress 755)

The amendment restricting the States failed of adoption in the Senate. The ground on which the proposal was opposed in the House by Mr. Tucker of Virginia was:

> "It will be much better to leave the state governments to themselves, and not to interfere with them more than we already do * * *" (*Id.*, at 756)

As a result of the action of the Senate, the First Amendment, a clear restriction of the power of Congress, was presented to and adopted by the States. But the power of the States remained unimpaired.

(2) *The Ninth and Tenth Amendments reiterate State power.*

Just as they feared that the absence of delegated power over speech and press would not without more explicit prohibition suffice to prevent Federal encroachment, the drafters of the Bill of Rights considered a positive declaration of reserved powers imperative. The Ninth and Tenth Amendments were designed to achieve this purpose, to make explicit that the reverse of the coin—restriction on Congressional power—was reaffirmation of State power. Thus, as expressed by Mr. Hartly on the floor of the House:

> "It had been asserted in the convention of Pennsylvania, by the friends of the Constitution, that all the rights and powers that were not given to the Government, were retained by the states and the people thereof. This was also his opinion, but as four or five states had required to be secured in those rights by an express declaration in the Constitution, he was disposed to gratify them. * * *" (*Id.*, at 732)

And Madison said:

> "I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several states. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it." (*Id.*, at 441)

By adoption of the Ninth and Tenth Amendments, therefore, it was determined that the States and the States alone had the power to regulate speech and press.

The basic differences which were intended between State and Federal functions as to speech and the press were indicated by Mr. Justice Jackson in his dissenting opinion in *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952), where Justice Jackson stated:

> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquility. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power, such as protection of interstate commerce.
>
> "When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.

> "For these reasons I should not, unless clearly required, confirm to the Federal Government such latitude as I think a State reasonably may require for orderly government of its manifold concerns."

The States have power over and responsibility for moral good order—accordingly there is State power to determine the limits on speech or press which morality may require. But the power and responsibility is that of the States alone; this is not a function of the national government (*Id.*, at 294). *Cf. Palko* v. *Connecticut*, 302 U. S. 319 (1937); *Gitlow* v. *New York*, 268 U. S. 652 (1925) (Dissenting opinions of Holmes and Brandeis, JJ.) (But see limitation noted in Point III).

(3) *Nationwide standards for judging "obscenity" do not exist.*

The wisdom of our Federal structure becomes apparent when we consider the anomalous results of an abuse of that structure—Federal obscenity legislation. Each State has enacted a complex of laws governing individual morals; the pattern of these laws varies in accordance with local custom and tradition. Societal mores and laws governing marriage, divorce, non-marital relations, profanity and other aspects of human activity which are components of the basic concepts of morality can and do vary from State to State.

The "mores of the community"—the standard against which the cases tell us "obscenity" must be tested—are inevitably the result of the interaction of these and other local factors. Within a given state there is perhaps basis for distilling a community attitude. But what possible basis is there for postulating "community mores" coextensive with the entire United States? In the variety lies our cultural wealth.

In a Southern state, where miscegenation laws are enforced, a description of interracial social activities might be deemed immoral; the same description be wholly inoffensive to a community in the North. Artistic expression considered shocking in remote rural areas may be deemed passé in large urban centers. On the other hand, everyday occurrences in the stables or the fields may shock those who are unfamiliar with animal husbandry. The diversity of mores and folkways in our many States safeguards us against a stultifying conformity. In aid of this diversity the Constitution must be read to proscribe the imposition of such conformity by Congressional fiat in the area of "obscenity". Facilities of travel and communication are the instruments of uniformity.

The simple fact is that as concerns moral attitudes, there is no national "community" and no basis in our Constitutional scheme for the development of any nationally uniform standard. The idea of a uniform nationwide consensus of moral values is a disturbing fiction particularly if imposed. So also was the fiction of Federal "common law" which was prophetically designated by Justice Holmes, in his dissent in *Black & White Taxicab* v. *Brown & Yellow Taxicab*, 276 U. S. 518 (1927) where at p. 534 he reminded the Court of the Federal judiciary's "unconstitutional assumption of powers * * * which no lapse of time or respectable array of opinion should make us hesitate to correct." The fiction of Federal general law was later held to be an unconstitutional basis of Federal judicial power in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). I suggest to the Court that the fiction of a national community of moral attitudes is equally an unconstitutional basis for Federal power.

(4) *Federal obscenity law interferes with the power of the States to mold the moral standards of the community.*

The Federal statutes purport to determine what printed matter may be mailed from a point in a given State to a destination which is within that State, in another State or in a foreign country; what may be received in a State of destination for distribution in that State; and what may be transported by common carrier from one State to another. As a result a Federal jury in New York may ban from the mails printed matter addressed to citizens of New Mexico, even though the State of New Mexico is wholly willing to permit its circulation there. Clearly the sovereign power of the State of New Mexico is infringed if such printed matter is adjudicated non-mailable under Federal law. Such a result is in clear violation of the First Amendment, which was intended to exclude Federal regulation of speech and press in this area.

The result is even more striking if we consider an instance in which the State itself—through the instrumentality, for example of a State university—may be prevented by Federal law from bringing literature into the State. This is not a remote possibility: "obscenity" prosecutions have been brought based upon educational literature dealing with sexual relations, which literature might well be used by State agencies. (*United States* v. *Dennett*, 39 F. 2d 564 (1930); *Walker* v. *Popenoe*, 149 F. 2d 511 (1945).)

More important, and indeed all important, is the valued use of our 48 separate experimental laboratories—our sovereign states—48 geographic areas evidencing varying cultural attitudes toward matters sexual; areas which have their highest value in these terms rather than in economic or geographic dimensions. To impress one uniform censor on these varying folkways cannot be consistent with the

concept of a Federal Government. The *Federal* concept imbedded in the Constitution demands the enrichment of comparative judgments and an emotional and spiritual free enterprise.

The needed diversity is easily illustrated. One need only look at the wide gap between the culture—Irish overlaid on Puritan—of New York and Boston which bespeaks a totally different standard of acceptance or rejection of matters sexual than does the Latin folkway of New Orleans. For example, also, one may note the conflicting pronouncements on the morality of the same book or motion picture which are made by civic or religious leaders in different localities throughout the nation. But all these variations pay tribute to the concept of Federalism in the Constitution and demand the persistence of that concept in matters of the mind. In this area, this Court has ever been cognizant of what in the vernacular is called "States rights", the concept that in a nation so vast the Founding Fathers negated in the Constitution any theory of a nationwide control of matter of the mind.

This area is removed from Federal power. The sedition area may even be preempted to the Federal Government while "merchandise words" may reside in State and Federal control.

POINT III

The power residing in the states over speech and press is not beyond all federal control.

This Court, as the ultimate guardian of the guarantees of the First Amendment, not only has the duty to enjoin any unlawful abridgement by the Federal Government of such guarantee; it also has the duty to the people of the Republic to protect against any attempt by the States to impose unreasonable restraints upon freedom of speech and press. Such is the command of the Fourteenth Amendment.

While it is recognized that the States possess the power to legislate with respect to the mores of the community, it must not be overlooked that such legislation is subject to the test of compliance with the First Amendment. The Fourteenth Amendment is the instrument for effectively protecting the people against the power of any State to tamper with their rights in speech and press. Upon its proclamation was finally satisfied the demand of Madison and other members of the First Congress for the addition to the Bill of Rights of a specific prohibition applicable to the States, against their abridgement of the First Amendment freedoms.

Just as the Federal authority has the Constitutional duty to prevent the establishment of non-republican institutions in the States flowing from the guarantee of a republican form of government, so also the National Government has the Constitutional power, and indeed the duty, to protect the people from encroachments by the States against the freedoms of speech and press. This Court must continue to invalidate unconstitutional limitations of speech and press imposed by the States. Should this Court

not carve out as unabridgeable the idea *qua* idea area discussed in Point I the States may in the future find themselves in a position where they may desire to invoke Federal aid in the maintenance of Constitutionally approved local standards. Such Federal assistance has a precedent; it was obtained in support of local standards governing the consumption of liquors within a given State. As a State may prefer to remain dry despite the fact that its neighbors consume liquors, so likewise a State may prefer not to have its citizens receive certain "obscene" printed or visual materials which are transmitted from another State but in the State of delivery are lawfully banned. In such circumstance, the State of delivery may call upon the Federal government for assistance. Cf. *James Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U.S. 311 (1917).

The Court is undoubtedly aware of an analogous provision of the Postal Regulations whereby the most local authority, the parent, may invoke the aid of the postal authorities in order to control the delivery of mail to his child. (See Post Office Circular 2, 12-1-54 154.22).

POINT IV

If the Federal Government does possess power in this area, the Federal obscenity statute is unconstitutional in that it violates the First and Fifth Amendments.

(a) Freedom of expression is the rule.

Even if Federal power over the subject matter of speech and the press be conceded, the statute supporting the indictment in this case is unconstitutional under the First Amendment. Through a complex of obscenity laws as noted in Point II the government has imposed direct regulation over the contents of the media of expression. Such power, it is well established, may be exerted only under exceptional circumstances.

> "The basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. These principles make freedom of expression the rule." (*Burstyn* v. *Wilson*, 343 U. S. 495) (1952); See also *Herndon* v. *Lowry*, 301 U. S. 242 (1936); *Thomas* v. *Collins*, 323 U. S. 516 (1944); *Winters* v. *New York*, 333 U. S. 507 (1948).

A narrow category of such exceptions has been recognized by the Supreme Court. These were summarized in this case below by Judge Frank, concurring as follows:

> "Any statute authorizing governmental interference (whether by 'prior restraint' or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite to a breach of the peace, or with sufficient probability tend either to the overthrow of the government by illegal means or to some other overt anti-social conduct." 237 F. 2d at 802.

There is as is set forth in the Appendix to this Brief ground to hold that the anti-social conduct aimed at has not been identified and that publications considered to be obscene do not lead to any identified anti-social conduct.

A publication may be constitutionally suppressed only if the government sustains the burden of proving that it contains material which incites to anti-social conduct sufficiently dangerous to justify the exceptional remedy of suppressing free speech. The government must prove clear and substantial danger of anti-social conduct and must make a showing of high probability that such anti-social conduct would take place if the publication were not suppressed.

> "In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (*Dennis* v. *United States*, 341 U. S. 494).

The government has the burden of justifying any restraint on speech or press. *Burstyn* v. *Wilson, supra; Thomas* v. *Collins, supra; West Virginia Board of Education* v. *Barnette*, 319 U. S. 624; *Dennis* v. *United States, supra.* There is no presumption of the constitutionality of a statute which impinges on these freedoms; on the contrary "the State has a heavy burden." (*Burstyn* v. *Wilson, supra*). Moreover • • • "When legislation appears on its face to affect the use of speech, press or religion, and when its validity depends on the existence of facts not proved, their existence should not be presumed." (*Busey* v. *District of Columbia*, 138 F. (2) 592 (1943).

In the Appendix to this Brief we have set forth an analysis of sociological and psychological data indicating the absence of any causal relationship between reading sexually stimulating material and overt anti-social conduct. This was also the conclusion of Judge Frank who, after

an exhaustive study of this question, found in this case that:

> "To date there exists, I think, no thoroughgoing studies by competent persons which justifies the conclusion that normal adults' reading or seeing of the 'obscene' probably induces anti-social conduct. Such studies do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that 'obscenity represents a ponderable causal factor in sexually deviant adult behavior. 'Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort to genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior.' What little competent research has been done, points definitely in a direction precisely opposite to that assumption.
>
> "Alpert reports that, when, in the 1920s, 409 women college graduates were asked to state in writing what things stimulated them sexually they answered thus: 218 said "Man"; 95 said books; 40 said drama; 29 said dancing; 18 said pictures; 9 said music. Of those who replied that the source of their sex information came from books, not one specified a 'dirty' book as the source. Instead, the books listed were: The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal diseases, medical books, and Motley's *Rise of the Dutch Republic.*' "

For the full statistical analysis of these figures, see Ernst and Seagle, *To the Pure . . .*, Chapt. XII, An Appeal to Science, pp. 234ff. (1928).

(b) "Obscene" cannot be defined.

Due process of law requires that a defendant know with some certainty of what he is accused (see (f) below). The case law of obscenity is remarkable for its failure to define what is supposed to be prohibited. Many courts and commentators have attempted to define the concept; all have inevitably failed. An objective student of the precedents cannot fail to agree with Judge Frank that:

> "If anyone regards as precise the standard in the obscenity statute, he cannot have read the pertinent cases." (*Roth* v. *Goldman*, 172 F. (2) 788 (1949).)

To the same effect see *Parmelee* v. *United States*, 113 F. (2) 729 (1940); *Bantam Books* v. *Melko*, 14 N. J. 524; *United States* v. *Roth*, 237 F. (2) 796 (1956).

See also *State* v. *Lerner*, 51 O. L. A. 321 (Ohio 1948), 81 N. E. (2) 282, 286 (1948).

> "Obscenity is not a legal term. It cannot be defined so that it will mean the same to all people, all the time, everywhere. Obscenity is very much a figment of the imagination—an indefinable something in the minds of some and not in the minds of others, and it is not the same in the minds of the people of every clime and country, nor the same today that it was yesterday or will be tomorrow."

The reasons for the inability of the courts to define obscenity have been aptly diagnosed by the Court of Appeals for the District of Columbia in *Parmelee* v. *United States, supra*, where the court said:

> "Probably the fundamental reason why the word 'obscene' is not susceptible of exact definition is that such intangible moral concepts as it purports to connote vary in meaning from one period to another."

(c) "Obscenity" depends on an infinity of variables which render the law completely uncertain.

As a result of their inability to define "obscene" the courts have, in effect, delegated the problem to the triers of fact. Juries or judges determine the extent to which "intangible moral concepts" shall be invoked to suppress rights guaranteed by the First Amendment. As Judge Hand has stated "obscenity is a function of many variables * * * and the verdict of the jury is * * * really a small bit of legislation ad hoc * * *" (*United States* v. *Levine*, 83 F. (2) 156 (1936)).

Under the Federal obscenity laws a very large number of variables may affect the fate of a publication. There are no standards adequate to prevent the trier of fact in any particular case from basing his judgment on his own subjective reactions. Preliminary to submission of the case is the determination to prosecute which, like the ultimate verdict, is bound by no precise limitations, and can, of course, be made on the basis of wholly extraneous factors. When the case goes to the triers of fact the ultimate result becomes anyone's guess, since the triers have virtually unlimited discretion to determine the law. In the first instance the jury must invest with content such terms as "obscene", "salacious", "immoral", "corrupt" or any other of the synonyms adverted to by the courts as substitutes for judicial definition. Here is an immediate invitation to punishment on the basis of the subjective reactions of the jury.[1] Second, the jury must evaluate the

[1] Thus, Chafee, in Government and Mass Communications (1947) comments, at page 210:

"The subject, by its very nature, includes a large element of irrationality * * * When the facts themselves are necessarily fraught with contradictory emotions, it is hopeless to expect officials and judges to be coldly reasonable in dealing with literary representation of those facts."

publication against the standards of the community. Here again, there is uncontrolled opportunity for subjective judgment.[2] Third, since the courts admit that moral concepts change with time, the result in the case of any given work depends on when the prosecution is initiated. Fourth, since under federal law the work may be prosecuted anywhere in the United States, the result depends on where the prosecution is brought.

Thus a publisher confronted with the federal obscenity laws lacks even a remote basis for evaluating whether a work may be held obscene. There is no rational body of judicial decision; there is no basis for predicting the subjective reactions of the jury; accidents of time or geography may become determinative. He may know that certain works have been condemned in certain places. But he also knows that the same works have been cleared—in different places or at a different time. He has no means of guessing where or when his publication will be prosecuted, what the mood of the community from which a jury will be drawn may be, whether the jury will reflect what he deems to be prevailing moral standards and in any case whose moral standards they will be. In other words, he is not in a position to make even an informed guess.

Obscenity is wholly different from other fields where defendants must risk the reactions of a jury, such as

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[2]Judge Frank noted, in his concurring opinion in this case below that:

> "If, in a jury case, the trial judge does not direct a verdict or enter a judgment of acquittal, the jury exercises the censorship power. Courts have said that a jury has a peculiar aptitude as a censor of obscenity, since, representing a cross-section of the community, it knows peculiarly well the average 'common conscience' of the time. Yet no statistician would conceivably accept the views of a jury—twelve persons chosen at random—as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the 'moral sentiments' of a generation ago, not of the present time."

criminal negligence. In the instance of obscenity not only is virtually every element a variable, but the defendant's fate actually rests on the subjective evaluation by the triers of the facts of "intangible, moral concepts." The trier of facts does not evaluate conduct against a framework of objective events and apply the standard of the reasonable man. Here the triers of fact determine what should or should not be circulated.

As Judge Frank pointed out in this case below, the law authorizes "hundreds of divers jury-legislatures with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression."

(d) The uncertainty of the standard is shown by the contradictory results of recent obscenity proceedings.

Even a cursory glance at the modern history of "obscenity" demonstrates how the purported standard is variously and contradictorily applied. Thus, the novel "Ulysses" was found importable as non-obscene in 1934 (*United States* v. *One Book*, 72 F(2) 705 (1934)); previously booksellers had been convicted under the New York Penal Law for selling it.

The novel "Memoirs of Hecate County" was found obscene in a criminal trial in Los Angeles in September, 1946; a bookseller indicted for selling the same book was acquitted in San Francisco in December, 1946. The publisher of the book was criminally convicted in New York in October, 1946 and the book was found non-obscene and therefore importable by administrative action of the Customs Service in California in 1954.

Similarly, the novel "God's Little Acre" was held "obscene" in Massachusetts in 1950. It was held not to be obscene in New York in 1933 and in Pennsylvania in

1948 (See *Attorney General* v. *"God's Little Acre"*, 326 Mass. 281 (1950)).

Nudist magazines have similarly been subjected to contradictory rulings in the courts. Thus, one lower federal court in the District of Columbia found magazines published by the nudist movement "not likely to promote lustful feelings or excite the sexual passions" (See *Summerfield* v. *Sunshine Book Co.* 221 F(2) 42 (1955).) Another federal district court subsequently found the magazines obscene (*Sunshine Book Company* v. *Summerfield*, 128 F. Supp. 564 (1955)), but was reversed on appeal by the Court of Appeals for the District of Columbia (*Sunshine Book Company* v. *Summerfield*, No. 12622, May 31, 1956).[3] During the same period a lower federal court in the Eastern District of Washington banned importation of certain foreign nudist magazines (*United States* v. *4200 Copies International Journal*, 134 Fed. Supp. 490 (1955)) on reasoning comparable to that of the reversed decision of the District Court in the *Sunshine Book* case, *op cit. supra.*

It is notorious that in the field of federal administrative enforcement of obscenity laws there is wide discrepancy between rulings of the Post Office Department and the Treasury Department, although each agency is presumably charged with the same responsibility to ban "obscenity". The New Jersey Court has commented, with respect to the federal administrative picture:

> "Nowhere is the inconsistency of literary censorship more patent than in the federal field." (*Bantam Books* v. *Melko*, *supra*)

[3] Subsequently reargued before the full bench.

(e) The uncertainties of the obscenity laws render them void for vagueness under the Fifth Amendment.

On the basis of the foregoing it is submitted that the Federal obscenity statutes are unconstitutional definitions of criminal liability. The due process clause of the Fifth Amendment forbids imposition of criminal sanctions where liability is as dependent on chance as it is under these laws. As Mr. Justice Rutledge said in *United States* v. *CIO*, 335 U. S. 106 (1947) (dissenting opinion), "Blurred signposts to criminality will not suffice to create it."

This Court stated the requirements of due process in *Winters* v. *New York* (333 U. S. 507 (1948)) where a somewhat different but no more precise restraint on freedom of expression than is here involved was invalidated:

> "The standard of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanctions for enforcement. The crime 'must be defined with appropriate definiteness.' * * *. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment * * *."

Section 1461 does not measure up to these requirements. When the result depends on subjective determinations of juries, and on happenstance of history or geography, there is no "ascertainable standard of guilt." The statute involved in this case and the other obscenity statutes are classic examples of legislation whose meaning can not be guessed at even by men of common intelligence. They appear also to be precisely the type of legislation condemned by the Court in *Herndon* v. *Lowry*, *supra*, on the ground that it "licenses the jury to create its own standard in each case."

While the majority opinion in the *Burstyn* case and in *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870 (1955) rests on the principle that the standards there involved, one of which was "obscenity", were too uncertain to satisfy the First Amendment, their reasoning—that "unbridled censorship" was involved—is also applicable to the Fifth Amendment. If a standard permits "unbridled censorship" it does not define a crime with reasonable certainty.

(f) The rule of certainty is particularly important when First Amendment rights are affected.

Because the rights secured by the First Amendment are preferred in the constitutional scheme, and because they are particularly vulnerable to impairment by prosecution under loosely worded criminal statutes, this Court has subjected such laws to most careful scrutiny.

In the *Winters* case the Court held:

> "Although we are dealing with an aspect of a free press in its relation to public morals, the principles of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution."

See also *Stromberg* v. *California*, 283 U. S. 359 (1930); *Herndon* v. *Lowry*, *supra*; *Kunz* v. *New York*, 340 U. S. 290 (1950).

Under this doctrine there is clearly applicable to the standard "obscene" Justice Frankfurter's statement in his concurring opinion in *Burstyn* v. *Wilson*, *supra*, that it:

> "remains too uncertain to justify constraining the creative efforts of the imagination by fear of pains and penalties imposed by a necessarily subjective censorship."

CONCLUSION

Along the lines of the Constitutional philosophy above set forth, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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March, 1957

Consents To File Brief Amicus

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March 14th, 1957

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Re: Roth v. United States,
No. 582
October 1956 Term

Dear Mr. Ernst:

We hereby consent to your filing a brief amicus curiae.

Very truly yours,

David von G. Albrecht

DVGA:ig

TELEGRAM

1957 Mar 14 11:32

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APPENDIX

Memorandum on the Lack of Causal Connection Between Exposure to Printed and Visual Materials and Participation in Anti-Social Conduct or Behavior

1. PRESENT STATE OF MAN'S KNOWLEDGE OF SUCH CAUSAL RELATIONSHIP

Only during the last several years have the effects of printed materials on readers been studied to any extent by social scientists. No study has been made which has shown causal connection between exposure to "obscene" printed and visual materials and participation in anti-social conduct or behavior. Moreover:

> "Although the whole subject of obscenity hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior." (Lockhart and McClure, "Obscenity and The Courts," 20 *L. & Contemp. Prob.*, 587, 595.)

Nor has it been demonstrated that youthful readers (who are often presumed to be most susceptible to influence) are affected by such material. Indeed, there has been a notable absence of results showing that any such effect exists.

> "Those who would ban books argue that particularly books make for juvenile delinquency or crime, induce violence and sadism, corrupt taste, promote sexual perversion, distort human values, subvert political loyalties, provoke disrespect for the law, produce demeaning stereotypes of groups and, in general,

make sin even more attractive than it ordinarily is. When evidence is put forward to support these claims, it is at best thin and questionable; more characteristically, it is entirely absent." (Richard McKeon, Robert K. Merton, and Walter Gellhorn, *The Freedom to Read*, 76 (1956).)

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Where an effect is so out of proportion to its supposed cause the conclusion must inevitably be that other factors are of greater force.

"We start with the proposition that an interest in pornography is seemingly not the molder of a man's personality but the reflection of it. Indeed, certain psychological experiments suggest that one who finds pornographic elements in allegedly obscene books is very likely to discover them also in apparently innocuous books, through a process of self-selection and emphasis that the reader himself brings to the words. The same process of self-selection—this tendency to read and see what accords with pre-existing interests—probably controls the effects of reading as well as the determination of what will be read. The fact that 'sex maniacs' may read pornography does not mean that they became what they are because of their reading, but that their reading became what it is because of them. Their personality, according to modern scientific findings that confirm a proposition stated long ago by the Jesuit fathers, was probably basically formed before they ever learned to read." (Walter Gellhorn, *Individual Freedom and Governmental Restraints*, 61-2 (1956).)

This conclusion as it applies to the effect of "obscene" printed materials, is amply supported by the two classes of evidence into which the existing research may be divided: (1) that of anti-social behavior and sexual stimu-

lation, showing neither to be caused by printed materials, and (2) that of printed materials, showing them to cause neither sexual stimulation nor anti-social behavior. We may set aside for the moment the question of whether or not sexual stimulation is in itself a cause of anti-social behavior, an even more dubious proposition.

The sources of anti-social behavior, like the effects of reading, have been studied intensively in juveniles on the assumption that the youthful individual is more susceptible to influence than the adult and more likely to show such influence if it exists. Special attention has been given by a Congressional Committee to the relationship between juvenile delinquency and the mass media—such as television, motion pictures, and comic books—and much testimony has been elicited from social scientists and other experts in the field (see Hearings and Reports of the Subcommittee to Investigate Juvenile Delinquency, 84th Congress, Reports Nos. 62, 1466 and 2055). The effect of the testimony is to suggest great doubt that the media—especially the printed media, in this case the comic book—have a primary or causative effect in producing anti-social behavior. "Majority opinion," the Committee reported, "seems inclined to the view that it is unlikely that the reading of crime and horror comics would lead to delinquency in a well-adjusted and normally law-abiding child." (Senate Report No. 62, 84th Congress, 1st Session, p. 12).

In communications to the Committee, many experts went further:

> "* * * In 25 years of practice, which includes 10 years majoring in juvenile and adult courtwork, I have never been able to pin down a definite major fundamental causal influence between crime, violence, etc., as depicted in movies, cartoons, books, or TV, and the offen-

sive behavior encountered in delinquency * * *." (Dr. George M. Lott, University Psychiatrist; State College, Pa., June 1, 1955).

* * *

"* * * To attack the television programs and the comic books appears to me to be rather like closing the stable door after the horse has escaped * * *." (Dr. Maier I. Tuchler, San Francisco, Cal., May 24, 1955).

* * *

"* * * It is my feeling that this literature and these programs serve a positive purpose in permitting the child or youth to live through emotionally, in a vicarious manner, his aggressive needs. If the disturbed child or youth who acts out his hostility in a violent manner were not exposed to these media, some other environmental influence would tend to provoke this hostility * * *." (Dr. Samuel R. Kesselman, Neuropsychiatrist, Newark, N. J., May 25, 1955).

This last opinion—that printed material with what may superficially appear to be anti-social content may actually serve to prevent anti-social behavior rather than encourage it—is shared by Dr. Lauretta Bender, Professor of Clinical Psychiatry, New York University, College of Medicine.

"As has been well stated by J. Moodie, normal, well-adjusted children with active minds, given insufficient outlets or in whom natural drives for adventure are curbed, will demand satisfaction in the form of some excitement. Their desire for blood and thunder is a desire to solve the problems of the threats of aggression against themselves or those they love, as well as the problem of their own impulses to retaliate and punish in like form. The comics may be said to offer the same type of mental catharsis to its readers that Aristotle claimed was an attribute of the drama * * *. That they supply a real need for the child there can be no doubt * * *.

"* * * We repeat that comics are representative of the folklore of the times, spontaneously given to and received by children, serving at the same time as a means of helping them solve the individual and sociological problems appropriate to their own lives." (Dr. Lauretta Bender, *A Dynamic Psychopathology of Childhood*, 227, 229, 230 (1954).)

Moreover, in groups where both delinquency and comic-reading are found—as shown by a study of 250 New York City school boys—research reveals no correlation between the two. (Herbert S. Lewin, "Facts and Fears about the Comics," *Nation's Schools*, 46-8, 52.) In a report to the New York State Temporary Commission on Youth and Delinquency, Children's Court Judge George W. Smythe, president of the National Probation and Parole Association, submitted a list of twenty contributing causes of juvenile delinquency ranked by the number of cases in which they had appeared. No communication media, let alone reading material are mentioned; reading *difficulty* is included but ranks eighteenth. (*New York Times*, September 2, 1955). This finding is fully confirmed by a summary of studies quoted by Judge Frank:

"(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern to the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other nonactive entertainments. Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read.

"(2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and

causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any were read by the delinquents. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubts concerning the basic hypothesis on which obscenity censorship is dependent.

"(3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards * * * And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society." (Appendix to concurrence in *United States* v. *Roth*, 237 F. (2) 796, at p. 813.)

The effect of printed materials even on impressionable children has not been shown even though the medium is universally available to them, consumed by them in large quantity, and direct in its emotional impact through bold color, pictorial simplicity, and highly dramatized content. Therefore, *a fortiori*, is it difficult to show such an effect on adults, who have been exposed to a much greater amount of experience and whose moral character, good or bad, has been more firmly molded.

This conclusion is further supported by the most important study of the subject, *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate*, prepared for the American Book Publishers Council by Marie Jahoda and the staff of the Research Center for Human Relations, New York University, March 1, 1954. Dr. Jahoda finds that there "is little consensus on what constitutes a 'bad' book beyond the tautological statement that a 'bad' book is one that has a 'bad' effect," and that at the same time "assumptions made by various people on the effect of 'bad' books are often inconsistent with each other, unprecise and confusing." (*The Impact of Literature*, 16.) In summation she writes:

> "There is a large overlap in content matter between all media of mass communication. The daily press, television, movies, radio and fictional printed material all present their share of the so-called 'bad' material, varying in the degree of reality attached to these matters. It is virtually impossible to isolate the impact of one of these media on a population that is exposed to all of them. Some evidence suggests that the particular communications to which an individual exposes himself are probably in good part a matter of choice. The reader does not take in everything that is offered but mostly what he is predisposed to take. In the realm of attitudes, this means that adult people prefer to expose themselves to material which expresses attitudes they already hold. A conversion of attitudes by any of the mass media is indeed a rare event, if it occurs at all * * *" (*The Impact of Literature*, 44.)

Even if one assumes—and there is no evidence for such an assumption—that the stimulation of erotic thoughts and desires leads of itself to anti-social behavior, the few studies that have been made of such stimulation rarely

show reading matter or printed materials to have caused it. A carefully conducted survey of a group of boys between the ages of 12 and 16 showed that 85 per cent had been aroused to the extent of "genital commotion" by such varied stimuli as carnival rides, playing a musical solo, fast car-driving, and seeing a column of marching soldiers. (Glenn V. Ramsey, "The Sexual Development of Boys," 56 *American Journal of Psychology*, 217, at 222-223 (1943). Kinsey, a noted authority in this field, also reports the effects of stimulation resulting from skiing, swimming, or sitting in hot sand. (Alfred C. Kinsey, *Sexual Behavior in the Human Male*, 164-5. (1948).)

Where reading plays any role whatever, it is likely to be one of information. In the classic study of twelve hundred unmarried women college graduates made by the Bureau of Social Hygiene of New York City, 218 reported that what they found the most stimulating sexually was, as might have been anticipated, the opposite sex. As for their sources of sex information, reading represented only six per cent of it, and among the books mentioned were the Bible, the dictionary, Shakespeare, a Lydia Pinkham advertisement, and Motley's *Rise of the Dutch Republic*. (Morris L. Ernst and William Seagle, *To the Pure* * * *, 249-255 (1928).) Obviously, given the appropriate circumstances, nearly anything can be sexually stimulating. If a person "reads a book when his sensuality is low," as Judge Curtis Bok puts it, "he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the printed page that have no business there." (*Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. R. 101, 137-38 (1949), aff'd 166 Pa. 120, 70 A. 2d 389 (1950).)

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Erotic stimulation, in any event, is not of itself the agent of anti-social behavior. If it were, the prohibitions affecting obscenity would have to be extended to include the wide variety of stimulating agents we have mentioned, and many more.

> "I think no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading obscene books has merely that consequence, Congress, it would seem, can constitutionally no more suppress such books than it can prevent the mailing of many other objects, such as perfumes, for example, which notoriously produce that result." (*Roth* v. *Goldman*, 172 F (2) 788, 792.)

Far from being anti-social, erotic stimulation is essential to the very existence of society. "Unless the human race is to vanish entirely, we can scarcely afford to regard the arousing of normal sexual desires as a social danger to be curbed at all costs." (Walter Gellhorn, *Individual Freedom and Governmental Restraints*, 59 (1956).)

One authority reports no examples whatever of sexual offenses stimulated by "obscene" matter. (Karpman, *The Sexual Offender and His Offenses*, 360 (1954).) It is a commonplace that at least the female half of the population is largely immune to stimulation of this kind.

> "* * * [A]s Kinsey makes clear, women are not particularly interested in certain kinds of sex behavior—such as exhibitionism, peeping, and circulating pornography—in which many males delight. The Indiana University researchers * * * explain this sex difference by pointing out that females are less aroused psychologically than are males." (Robert Veit Sherwin, "Female Sex Crimes," in *Sex Life of the American Woman and the Kinsey Report*, 177-8 (1954).)

Furthermore, it has often been observed by psychologists that the individuals most interested in printed material with erotic content are the ones *least* likely to engage in any overt act as a result of it. (Testimony of Dr. Albert Ellis in *United States* v. *Roth*, S.D.N.Y. C-148-9 at p. 365.) The most delinquent youths are least likely to be interested in any kind of reading; of the delinquent and emotionally disturbed children in a survey presented to the Boston Kefauver Hearings on Juvenile Delinquency, the great majority had already manifested their disturbance before the age at which they could read at all. Not erotic stimulation but its very opposite—the inability to be stimulated—is characteristically found in what society calls sexual deviants and purveyors of "obscenity." A study of virtually all of the sex offenders convicted in New Jersey between April, 1949 and June, 1950 revealed that, aside from those involved in statutory rape and incest, they tended to be sexually inhibited and repressed rather than overimpulsive or over-sexed. "All told, 54 per cent of those studied showed severe sexual inhibition; and high rates of inhibition were particularly found among those convicted of non-coital sex relations with a minor, exhibitory acts, and disseminating 'obscene' material." (Albert Ellis and Ralph Brancale, *The Psychology of Sex Offenders*, 93-5 (1956).)

Those who are most affected tend to be, not the delinquents, but the prudish and censorious individuals who typically initiate complaints against material they find "obscene." They, and not the delinquents, are the only persons who consistently respond to published "erotica" in such a manner as to indicate any cause-and-effect relationship:

"* * * [T]he local Comstock, who prowls the book stores and magazine stands searching for 'shocking passages' to point at in horror, alarm, and glee, finds exactly what he is looking for and would be disappointed if he did not * * * He is often an emotionally disturbed and intemperate person with a paranoid personality. His attention is focussed on smut, and since he looks for it, he finds it everywhere." (Lockhart and McClure, "Literature, The Law of Obscenity, and the Constitution," 38 *Minn. Law Rev.* 371-378 (1954).)

2. IRRATIONAL JUDICIAL ODDITIES EMPLOYED TO COMPENSATE FOR ABSENCE OF EVIDENCE OF CAUSAL RELATIONSHIP

The compulsion of man to try to explain or justify the occurrences of the world about him is his noblest characteristic and his gravest danger. In the absence of a method of inquiry which offers either a reasonable hypothesis or a scientifically tested cause and effect relationship resort is had to the process of rationalization. To secure acceptance a rationalization need meet no objective standards—the approbation of those forces in the community enjoying the power of suasion is sufficient. It is "judicial notice" at its worst.

It has therefore been normal and indeed inescapable for man, whether juror or judge, in the absence of knowledge showing a causal relationship between ideas and behaviour in the field of morals or sexual conventions, to evoke a rationalization as a substitute for constitutional standards. Since 1872 the judicial determination of obscenity has rested on a variety of conflicting unestablished subjective assumptions, including:

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1. Motive of the author. This is often invoked as an excuse for suppression or defense for freedom of his ideas. This obviously is a complete negation of any scrutiny of the effect on the reader; causal relationship is dispensed with. But assuming even that a given idea in print or picture can be shown to elicit anti-social behaviour, then surely an author with high motives can bring about the evil, and similarly an author with low motives, perhaps even intending to bring about such evil, can be ineffective.

2. Price. In many cases the price at which the book is sold is used as a test. By and large expensive books gain immunity thereby. The only validity of such testing factor lies in the presumption that the rich are incorruptible or are already corrupted, or that which is costly is therefore not tawdry. This is basically a cornerstone theory of an aristocratic society.

3. A greater measure of freedom for the daily press. A special and understandable sanctity of freedom for the daily and weekly press as distinguished from other printed formats seems to have been developed by our legislators and judges. Apparently it is assumed that books and magazines require the interposition of a censor between the author and the community, whereas the more readily available newspaper must be viewed under different standards. Perhaps the unwillingness to attack the newspaper is only an expression of fear on the part of the censorious that such an attack on a popular institution might lose to them the freedom to condemn other material.

4. Classics. In historic terms there is to be found an amusing conflict which leads to the grant of immunity from

obscenity laws to so called classics. No one has yet determined how long an author must be dead before his work becomes a classic. We would appear to have developed a reverence for classics to the point where their obscenities can travel through our culture with impunity. An idea back of this absurdity may be that a person reading a classic becomes enveloped in a distinguished mood that eliminates the impact of sexual material from any effect on the gonads.

5. Isolated passages. A recent trend indicates that any book must be read as a whole and cannot be suppressed because an isolated passage is deemed offensive. If, as the censor contends, the community must suffer some anti-social behaviour germinated by the specific episode, then what matters it, the content of the surrounding material? This supposedly modern approach by our courts is in reality only an application of the *de minimis* concept, useful in other areas of life, but of doubtful value in a situation where the effect upon the mind of the reader is the vital question.

6. Recently there has been a scurrying about the bookshops and newsstands throughout our nation directed primarily toward format, namely: paper bound books. This accent on a new format is typical of man's historic approach to communication; the fear of Guttenberg's press compared to the quill, the fear of radio compared to the printed word, the fear of movies compared to the spoken word, all give evidence that each new technique of dissemination invites attack on the technique and not essentially on the extension of the available audience.

7. Protection of our women. Only recently has there been a trace of impact of the new knowledge produced by scientists that women are not affected as are men by sexual titillation in print; they are not attracted by the so-called pornographic. For decades it has been theorized that material must be suppressed in order to protect our women. In the light of the scientific investigation that has shown that print or pictures are clearly without sexual glandular behaviour impact on women, the rationale must find its resting place along with the other fictions, legal and moral, that until this century guarded and disabled them.

8. Until recently in fetching for an excuse to condemn, no distinction was made between the impact on children of fiction as compared to non-fiction. The attack in the main has been on fiction. Investigation may well, however, recognize that realism, particularly in the daily press, has a very different impact than has anything in the realm of fiction or escape literature. Sexual perversion or deviation portrayed as an historical event may impress the mind of an adult, as well as the child, in quite a different fashion than the equivalent material appearing as fiction.

9. There are certain areas of relief provided in our enforcement of obscenity statutes to prevent the courts from being held up to ridicule by the upper reaches of our culture. One notes, for example, the existence of so-called obscenity contained in the reported law cases; the collections of "pornography" amassed by some of the more important libraries; and the practice of sending so-called obscenity material stopped from importation into the United States, to the Library of Congress for use by the learned.

10. Educational materials. Exceptions have been created in the name of education for manuals of sex instruction. Detailed explanations and specific illustrations contained in such works are permitted to circulate while similar descriptive passages translated to the medium of fiction subject the work to the danger of prosecution.

11. Competing forms. One of the curious anomalies in the area of censorship has developed in recent years with the advent of radio and television broadcasting. The book banned in one jurisdiction is read over radio facilities; the film which failed to obtain the approval of the censor is televised—both may be received by the people of the locality which has forbidden their introduction. Similarly, those states and cities which pre-censor all motion pictures may never have the opportunity to review the televised film.

12. Courts, Customs and Postal authorities at times dip into a mirage of subjective sexual connotations as tests of obscenity. Among other tidbits so used: High heels, nudity as distinguished from nakedness, black stockings and bras as exciters of males, four letter Anglo-Saxon words as distinguished from euphemisms of same implication, explicit as compared to implicit excitements, etchings as compared to paintings, verse versus prose, shift from stockings on women at bathing beaches to bare legs at a later date in a changing mores, brown breasts as compared to white breasts, *et cetera.* A recent confusion appears since "filthy" in the statute implies repulsion, a force, if any, antithetical to excitement.

13. Privacy. Some among us contend that each citizen has, as a part of the protection afforded him by the community, a right of privacy not to be deluged with noxious material. The individual, it is urged, should not be compelled to suffer this burden. While there is no evidence as to the extent of the burden, this taxation of the sensibilities of the community is really of little importance. We are, in these States, constitutionally dedicated to the creed that each citizen must exercise the right of selection secured to him by the First Amendment to choose from among all the thoughts of the mind of man freely communicated to him, to establish, without the aid of government, his own level of taste. Immunization from offensive products of the press must, if needed, be self-imposed.

* * *

A valuable list of books suppressed in our culture and elsewhere can be found in Banned Books by Anne Lyon Haight, 1955. The time and locale and circumstances of censorship gives ample evidence of the gravamen of this Appendix.

3. SOCIETAL SCARS CREATED BY LACK OF CONSTITUTIONAL STANDARDS FOR CONTROL OF SEXUAL STIMULI

Just as it may be shown that the effects of a given piece of reading matter are unlikely to be harmful, it can also be shown that the effect of censorship is not only harmful in itself but the source of other harms. Censorship removes to the courtroom questions of aesthetic and moral judgment which the healthy society, if it is to remain healthy, must settle for itself. Only through voluntary action—as Milton most eloquently argued in the *Areopagitica*—can either an individual or society exercise its moral muscles. A noted contemporary theologian has also commented on the inappropriateness of confusing the two areas:

> "Officers of the law must operate under statutes which in this matter are, or ought to be, narrowly drawn. On the other hand, voluntary reform, precisely because it is voluntary, may be based on the somewhat broader categories of common-sense judgment." (John Courtney Murray, S.J., "The Bad Arguments Intelligent Men Make," *America*, November 3, 1956.)

The effect of censorship by law is to provide an arena for combat between social forces whose antagonisms are notoriously irrelevant to the social problems, such as they are, presented by the circulation of "pornography." The most familiar of these is "the fight between the literati and the philistines," as two legal scholars have put it, for aesthetic jurisdiction over book publishing. (Lockhart and McClure, 38 *Minn. L. Rev.* 295, 328-9 (1954).) Both parties to the dispute tend to treat the legal history of

obscenity as a series of victories or defeats, located on a scale between liberality and license; and thus is further postponed any objective analysis and cure of whatever anti-social phenomena are involved.

It may also be said of censorship in matters pertaining to sex that it derives from those general social and cultural criteria that are frequently called, for lack of a better name, "Puritan." Even the proponents of censorship accept this label:

> "The ascendancy of Puritanism in England promoted a pious reserve in language as in conduct * * * The Victorian era was a time of literary restraint * * * It may be that the time has come for the pendulum to swing back again * * * a consummation devoutly to be wished." (Gathings Committee Report, p. 5.)

While this statement has the merit of recognizing that standards have changed, it fails to point out that historical perspective has increased our understanding of those earlier times. We now know that the Puritans were not so "puritan," and that the Victorians cultivated "pious reserve" more in theory than in practice. "Puritan" standards have indeed been in good part abandoned for the very reason that we have discovered them to have been largely a surface veneer and a source of hypocrisy. "Every censorship," as Harold Lasswell writes, "produces a technique of evasion as well as a technique of administration." (*Censorship*, 3 Encyc. Soc. Sci. 290, 294 (1930).) Censorship and hypocrisy thrive on one another.

One effect of sexual censorship is to intensify the technically "decent" but highly emotional concentration on sex in advertising and entertainment in forms that are comparatively morbid and unhealthful:

"Censorship, official and unofficial, lets pass into the social mainstream countless images and innuendoes that could only be identified—if they were to be identified—as perverse. Of the normal, the lustful thoughts and desires of one sex for the other, it faithfully removes whatever trace it can." (Larrabee, "The Cultural Context of Sex Censorship," 20 *L. & Contemp. Prob.* 685 (1955).)

And it enormously increases the concentration of public attention on violence. "There is no mundane substitute for sex except sadism," writes the author of a study of the relationship between the two. "You may search the indexes to Krafft-Ebing, Ellis, Hirschfeld, Guyon, or any dozen sex scientists, but you will find no other human activity that can replace sex completely * * *. It is no accident that the end of Restoration bawdry coincided precisely with the fullest flowering of literary sadism in England * * *. The elegant eighteenth-century litterateurs, Johnson and Pope, are famous equally for the sexual purity of their writing, the sadistic cruelty of their speech: Sex being forbidden, violence took its place." (G. Legman, *Love and Death*, 9, 10 (1949).)

This phenomenon can be found ubiquitously in American popular reading matter—for example in the works of Mickey Spillane, which have the largest printings of any novels published in America. ("As of June, 1954, 24,000,000 copies of Spillane's books had been published." Christopher La Farge, "Mickey Spillane and His Bloody Hammer," *The Saturday Review*, November 6, 1954, p. 11.) The combination of sex and sadism has frequently been observed, but it should also be noted that there is an imbalance between the two. "Sex, in these novels, is lush but abortive and unresolved. Sadism is explicit, fully re-

alized, minutely described." (Anon., "Dames and Death," *Harper's Magazine*, May, 1952.)

Ideally, the literary art and the public consciousness should lend equal weight to both love and death, to the act in which life begins and that in which it ends. The healthy mind will not become excessively preoccupied with either, but neither will it shun them. Deny one entirely, however, as sexual censorship aims to do, and the other is naturally increased in prominence and emotional magnetism. Our media of communication are therefore overabundant in violence—newspapers which prey on catastrophe, television programs and radio "soap operas" which prey on domestic misery, an entire division of book publishing which preys on murder.